# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>August 8, 2013 |
| v | No. 310918<br>Berrien Circuit Court |
| STANLEY LEVELLE WHITE,<br><br>Defendant-Appellant. | LC No. 2011-003034-FC |

Before: BORRELLO, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of armed robbery, MCL 750.529, one count of possession of a firearm at time of commission of a felony (felony-firearm), MCL 750.227b, and one count of willful and malicious interference with electronic communication, MCL 750.540. He was sentenced to 12 to 30 years for the armed robbery convictions, two years for the felony-firearm conviction, and 286 days for the interference with electronic communication conviction. He now appeals and we affirm.

On appeal, defendant only challenges the felony-firearm conviction, arguing that there was insufficient evidence to support it. This Court reviews de novo sufficiency of the evidence issues. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). In determining the sufficiency of the evidence, this Court "reviews the evidence in the light most favorable to the prosecution." *Id.* This Court must determine "whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt." *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010).

It is unclear whether defendant was convicted as a principal or as an aider and abettor on the felony-firearm charge. In either case, however, there was sufficient evidence to support his conviction. A person is guilty of felony-firearm when that person "carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony." MCL 750.227b. The standard for "aiding and abetting felony-firearm in Michigan is whether the defendant procures, counsels, aids, or abets in [another carrying or having possession of a firearm during the commission or attempted commission of a felony.]" *People v Moore*, 470 Mich 56, 70; 679 NW2d 41 (2004).

At trial, three witnesses testified about which men had guns when the store was robbed. The victims, Robert and Linda Wagner, testified that (1) they were each attacked by a man with

a gun, (2) that the man who attacked Linda was different than the man who attacked Robert, (3) Robert saw the man who attacked him, (4) Linda saw the man who attacked her, (5) neither Robert nor Linda saw each other's attacker, and (6) a third man was yelling from the front door. One of the co-defendants, Quentin Willford (who was the getaway driver), testified that (1) three of the men involved actually entered and robbed the store and (2) two of the three men had guns. Willford further testified that defendant was one of the two men who had a gun.

In making his argument, defendant relies heavily on the fact that Willford was the only witness to testify specifically that defendant had a gun. But the test is whether the prosecutor presented sufficient evidence to establish beyond a reasonable doubt that defendant had actual or constructive possession of a firearm during the robbery. *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). This can be proven by circumstantial evidence or direct evidence. *Id.* at 469, citing *United States v Smith*, 591 F2d 1105 (CA 5, 1979). But ultimately, it is a question of fact for the jury to decide. *Hill*, 433 Mich at 469, citing *United States v Holt*, 427 F2d 1114 (CA 8, 1970).

Here, the jury found defendant guilty of the felony-firearm charge. Viewing the evidence in the light most favorable to the prosecution, the jury, as a rational trier of fact, found that the evidence proved the essential elements of the crime beyond a reasonable doubt.

To the extent that defendant is also arguing that the aiding and abetting jury instruction, as applied to the felony-firearm charge, was improper, defendant failed to preserve his challenge for appeal because he did not object to the jury instruction when it was given at trial. By failing to object to the aiding and abetting instruction, defendant forfeited his right to do so absent a showing of plain error. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004). Under the plain error standard, defendant must meet the following requirements: (1) "error must have occurred;" (2) the "error was plain," such as clear or obvious; and (3) "the plain error affected substantial rights," i.e.: a showing of prejudice is sufficient. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). This Court need only correct a plain error if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 US at 736.

The trial court gave separate instructions to the jury for each crime defendant was charged with: Count I and II of armed robbery, felony-firearm, and interference with a telephone communication. The trial court then read the instruction on aiding and abetting. The aiding and abetting instruction provided, in relevant part:

> In this case the defendant is charged with committing armed robbery regarding Robert Wagner, armed robbery regarding Linda Wagner, felony firearm, and interference with a telephone communication, or intentionally assisting someone else in committing those crimes. Anyone who intentionally assists someone else in committing a crime is guilty as a person who directly commits it, and can be convicted of that crime as an aider and abettor.
>
> To prove this charge of aiding and abetting, the prosecutor must prove each of the following elements beyond a reasonable doubt: First, the alleged

> crime was actually committed either by defendant or someone else. It does not matter whether anyone else has been convicted of the crime. Second, before or during the crime the defendant did something to assist in the commission of the crime. Third, the defendant must have intended the commission of the crime alleged, or must have known that the other person intended its commission at the time of giving the assistance.
>
> Now, it does not matter how much help, advice, or encouragement the defendant gave, however, you must decide whether the defendant intended to help another commit the crime, and whether his help, advice, or encouragement actually did help advise or encourage the crime.
>
> Even if the defendant knew that the alleged crime was planned, was being committed, the mere fact that he was present when it was committed is not enough to prove that he assisted in committing it.

Defendant argues that this instruction failed to tell the jury what the prosecutor must prove to convict defendant of felony-firearm under a theory of aiding and abetting.

Under the plain error review, however, it cannot be said that an error affected defendant's substantial rights in such a way that requires this Court to now correct the error. This Court need only correct a plain error if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 US at 736. Perhaps the trial court could have arranged the jury instructions in such a way that defendant was more satisfied with the final presentation. But the instruction given by the trial court was that one agreed to by the parties as applicable. Further, it accurately states the law. There was no plain error in the instruction as given.

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Deborah A. Servitto